

March 11, 2024

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave. NW
Washington, District of Columbia 20580

Re: Comments of ACT | The App Association re the Federal Trade Commission's Notice of Proposed Rulemaking, *Children's Online Privacy Protection Rule, Project No. P195404* (89 FR 2034)

ACT | The App Association (App Association) respectfully submits its views to the Federal Trade Commission (FTC) on its request for public comment in the above-captioned proceeding.¹ The App Association appreciates the Commission's evaluation of its existing regulations pertaining to the Children's Online Privacy Protection Act (COPPA) Rule and its consideration to modify, retain, or eliminate parts of the Rule deemed ineffective for the constantly changing technology marketplace.

I. Introduction and Statement of Interest

The App Association is a global trade association for small and medium-sized technology companies. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. The value of the ecosystem the App Association represents—which we call the app economy—is approximately \$1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the \$8 trillion internet of things (IoT) revolution.²

Trustworthiness and safety are integral for the success of innovators in the mobile app economy, especially for smaller tech companies that may not have substantial name recognition. The prioritization of strong health, safety, and privacy protections is even more important for vulnerable populations like children, serving as a key component to developing consumer trust in the tech-driven products and services our members provide. The App Association helps shape and promote privacy best practices in a

¹ 89 FR 2034.

² ACT | The App Association, State of the App Economy (2022), <https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL.pdf>

variety of contexts, including for apps directed to children and digital health tools, making us well positioned to provide insight to FTC.

Since COPPA's inception, the App Association has played an active role to make sure that the small business community is aware of their responsibilities under the COPPA Rule. For example, the App Association created a checklist for apps that are made for children to ensure that there is a free accessible resource for small businesses to use as a guide to comply with the COPPA Rule.³

While the App Association supports protecting children's privacy, over time the current COPPA rules have disproportionately squeezed small developers out of the market for apps and software programs directed at children. We encourage the FTC to implement changes to the current rule that set reasonable and effective requirements for small developers to become compliant with COPPA, while still providing new and novel technology for the next generation. COPPA rules should support platforms, developers, and parents in the creation of new apps that engage and help children in a range of contexts.

The App Association builds on its detailed responses to the FTC on COPPA submitted in 2019,⁴ as well as more recent comments submitted to the National Telecommunications and Information Administration (NTIA) with respect to its initiative to prevent and mitigate adverse health effects from children's use of online platforms, while preserving benefits platforms have on minors' health and well-being.⁵

II. The Current State of Children's Online Usage and Parent Engagement Impacting Businesses' Use of COPPA

According to the App Association's research, 85 percent of parents have concerns about their children's digital privacy.⁶ PricewaterhouseCoopers (PwC) says that kids aged 8 to 18 spend an average of 7.5 hours in front of a screen for entertainment each day.⁷ With this high amount of screen time for children, in combination with the high percentage of parental concerns held with respect to their children's privacy, one would assume that parents would actively take steps to address their children's screen time, such as enabling parental control settings on their children's devices to make sure they do not have access to inappropriate information and reading privacy policies that the child may not understand due to their age and lack of life experience. Yet, research

³ <https://actonline.org/family-app-privacy/>

⁴ <https://www.regulations.gov/comment/FTC-2019-0054-116872>.

⁵ <https://www.regulations.gov/comment/NTIA-2023-0008-0482>.

⁶ Morgan Reed, *Developers and COPPA: Their Real-World Experience*, F.T.C. COPPA WORKSHOP, https://www.ftc.gov/system/files/documents/public_events/1535372/slides-coppa-workshop-10-7-19.pdf (October 7, 2019).

⁷ <https://www.cdc.gov/nccdphp/dnpao/multimedia/infographics/getmoving.html>.

shows that only half – and, depending on the specific modality, less – limit screen time or use parental settings on their children’s device.⁸

The research demonstrates that while parents often say they care deeply about their children’s privacy, their actions display less concern. Parents may also feel that they should not be the ones responsible for setting the parental controls in place. Indeed, many parents would prefer that app developers provide free educational applications that help their child learn how to read, understand their multiplication tables, or provide some entertainment with the needed privacy provisions already in place to protect their children. However, developers with children-directed apps must balance using financial resources to stand out in a competitive app market with the costs of complying with general privacy laws, COPPA, and other state children’s privacy laws and regulations. We urge FTC to help minimize these burdens to promote innovation.

Further, meaningful enforcement of COPPA regulations is needed to ensure that FTC rules protecting children are taken seriously. For those in relevant markets, App Association members put significant resources into protecting child privacy, taking measures that far exceed minimum legal requirements, in contrast to others in the ecosystem operate as if the rules do not exist. We are encouraged by FTC enforcement against flagrant violators of the FTC’s consumer protection rules,⁹ and urge to build on these actions in addressing COPPA rule violations.

The App Association also requests that FTC carefully consider state-level developments addressing privacy and biometric data, such as Illinois’ Biometric Information Privacy Act, which are expanding liability for the processing of such data. We appreciate the FTC’s efforts to address improper uses of biometric information under Section 5, which it has addressed in its May 2023 Policy Statement.¹⁰ We call on FTC to do all it can to advance preemptive privacy rules that give the strong privacy protections to all children across the country.

III. App Association Responses to Specific Proposals and Questions Posed in the FTC’s COPPA Notice of Proposed Rulemaking

The App Association generally shares the FTC’s goal of updating the COPPA rules to respond to changes in technology and online practices, and where appropriate, to clarify and streamline the rules. We generally support the FTC’s proposal to maintain important foundations of the COPPA rules, including with respect to scope, requirements for actual

⁸ <https://www.statista.com/statistics/232345/parental-control-over-childrens-media-consumption-in-the-us/>.

⁹ *FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay \$245 Million for Tricking Users into Making Unwanted Charges* (March 14, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making>.

¹⁰ <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-warns-about-misuses-biometric-information-harm-consumers>.

knowledge, notice, and other areas. However, several aspects of the FTC's proposals have given rise to concerns from our community and may inadvertently create confusion and unnecessary disruption for those going above and beyond legal requirements in offering their innovative products and services to children. We offer our various responses to questions and issues raised by the FTC below and look forward to further engaging with FTC moving forward.

A. The COPPA Definition of Personal Information Should Not Include a Child's Unidentifiable Biomarkers (Voice, Face, Fingerprints)

Under the COPPA rules, personal information is "individually identifiable information about an individual collected online, including: . . . (8) a photograph, video, or audio file where such file contains a child's image or voice."¹¹ Across modalities, children are accessing (and contributing) online content at younger and younger ages. Many households use Apple's Siri[®], Amazon's Alexa[®], and Google's Google Home[™] and it is inevitable that the device or an application on the device may pick up a child's voice, often without it knowing due to its inability to detect the difference. Another common device used in the home by kids is a video game console, such as Microsoft's Xbox and Sony's PlayStation, which allows the child to talk to other users online. Furthermore, there are applications made for individuals with learning or physical disabilities to help them in their everyday lives and enable them to have independence from a caretaker. For example, autistic children could be using an app to help them with their speech, which would require the collection of the child's voice in order to make their statement clearer; or a child who is blind may also speak to the virtual assistant software in their phone in order to use the phone's basic functions. Many new apps may collect biomarkers such as voice, facial features, and fingerprints in some form, and the App Association urges the FTC to consider how these latest technologies can fit into a law created nearly 20 years ago. We urge the FTC to recognize the burdens associated with COPPA compliance, particularly for small business developers of such technology. For example, developing additional technology to identify the difference between an adult and child voice remains a need, and its implementation may be prohibitively expensive while providing no additional protections for the child if the biomarker is deidentified. The App Association fully supports privacy protections for children, but we all lose if we disincentivize the development of such tech through potentially unfeasibly regulatory requirements. Therefore, the App Association urges the FTC to modify its definition of personal information to exclude "biomarkers."

To the extent "biomarkers" are included in the definition of personal information, we urge FTC require only that a business comply with COPPA when identifying, or reasonably identifying, the biomarker and specifically associating it with the child as opposed to the child's biomarker only being generally wrapped up in a data collection by an app. Furthermore, biometric data (1) not used for recognizing, and which do not permit contact with, the unique individual; or (2) required for other processing operations

¹¹ 16 C.F.R. § 312.2 Definitions (2013).

already covered by the internal operations exemptions should be clarified to be falling under the explicit consent exemption.

In response to Question 6, the App Association notes that avatars are temporary and alterable representations that often do not reflect a person's characteristics and do not enable contact. Therefore, avatars should not be considered personal information.

B. The Definition of a "Website or Online Service Directed to Children" Should be Revised to Align with the COPPA Statute and Feasibility Considerations

The App Association supports FTC's proposal to retain its approach to defining websites or online services "directed to children" as in scope of the COPPA rules using a multi-factor test. However, we urge FTC to ensure that the factors used in this test are based on intended uses and what is within the control of an operator. For example:

- Considering "reviews by users or third parties" would introduce consideration of statements completely outside of the control of an operator that are highly subjective, and would require operators to investigate whether statements made in a review are directed to a child and may provide an operator reason to know it collects personal information from children; and
- Considering "the age of users on similar websites or services" in the multi-factor test would require operators to somehow assess intended and actual audiences of other services when there is no meaningful way to do so.

Such proposals, in effectively introducing a constructive knowledge standard into COPPA compliance, would contradict the actual knowledge standard plainly set forth in COPPA as well as FTC's guidance stating that a service is not child-directed simply because some children use the service and that operators of general audience services have no duty to investigate the ages of their users.¹²

The App Association generally supports FTC's proposed analysis for "mixed audience" offerings, which would allow operators to address protections for those who identify as 13 years old or younger, and we request further clarity from FTC as to when prior collection of information for the purposes of determining whether a user is a child is allowed. We also urge FTC to ensure that its proposed two-step approach for "mixed offerings" aligns with FTC's stated policy of applying the COPPA rules to the "subset of Web sites and online services already considered directed to children under the Rule's totality of the circumstances standard," where FTC would only examine whether children are a primary or secondary audience under a totality of the circumstances.¹³

¹² <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions>.

¹³ 78 Fed. Reg. 3972, 3984.

C. *The App Association Supports the FTC's Proposals to Enable Additional Mechanisms for Obtaining Verifiable Parental Consent*

A number of practical COPPA compliance challenges arise from the fact that many apps integrate into and operate through mobile communications platforms maintained by a different operator. As a result, certain information—such as the user's IP address, device ID, username, or screen name—sometimes shares automatically between the app developer and the platform provider when a user runs the application. This limited information sharing supports (and is often necessary for) the technical and operational functioning of the app.

The App Association urges the FTC to permit more efficient and practical solutions for compliance that take advantage of the latest pro-consumer developments in technology. We see VPC as three separate and distinct steps:

1. Verifying that the person who will be providing consent is an adult.
2. Notifying the consenting adult of the intended collection, use, and disclosure of the child's personal information by the app developer, consistent with the disclosures made in the privacy notice.
3. Obtaining consent from the adult of behalf of a child (under the age of 13) that the app is permitted to collect, use, or disclose personal information provided in the notice.

The App Association encourages the FTC to allow platforms to innovate as they utilize as they implement these three steps to obtain VPC. A potential innovation could include a mechanism to verify that a person is an adult and able to consent to an app's privacy policy on behalf of a child, or the first step of VPC. Additionally, the platform can provide the consenting adult with a notification of the collection, use, or disclosure of the child's personal information in accordance with the second step of VPC. Finally, a platform may provide implementation methods to the app developer for ways in which the app developer may obtain verifiable parental consent from the parent. However, it is the sole responsibility of the app developer to select and obtain COPPA-compliant VPC from the parent for the collection, use, or disclosure of the child's personal information. As a result of these collaborative efforts by platforms and app developers, parents can make informed decisions about the apps their children use in an exponentially streamlined and transparent fashion.

The App Association notes that some platforms already implement similar procedures by offering family plans to sign up and use a platform along with providing parents optional settings for their children such as "asking to buy," rejecting or approving a purchase, monitoring content, or placing limits on screen time from the parent's device. This allows a parent a simplified process to see what their kids are doing on their devices and decide what limits they want to set for their children, and ensures that parents have meaningful notice of and control over how an app collects, uses, and discloses their children's personal information without imposing unnecessary burdens and costs on app developers.

The App Association therefore supports FTC’s proposals to add new approved methods for obtaining VPC that may be used at the option of the operator, including text messages, knowledge-based authentication, and facial recognition technology. Already used for two-factor authentication across a range of contexts, some of these options are widely used modalities that can and should be relied upon. The FTC is also proposing to eliminate the monetary transaction requirement for obtaining consent through a parent’s use of a credit card, debit card, or online payment system—under this proposal, the parent would simply need to enter their payment information without actually being charged.

We encourage FTC to ensure that its rules do not introduce unneeded friction into the VPC process. For example, the App Association supports the FTC’s COPPA rules allowing operators to gain consent for third-party disclosures as part of the broader first-party VPC process for the underlying collection/use of personal information (e.g., a disclosure and checkbox). Further, once a parent has provided consent to a third party to make disclosures through parental controls settings, this choice need not be reaffirmed separately in the VPC process.

D. Considerations in Addressing Persistent Identifiers for Contextual Advertising

With respect to question 10, the App Association has broached the need for lawmakers to address targeted advertising to minors in testimony to Congress.¹⁴ As we have noted for Congress, there may be constitutional implications of an outright ban on certain kinds of advertising. Experience has shown that bans on advertising, even to minors, have had difficulty standing up to First Amendment scrutiny, and there may be less constitutionally fraught ways of dealing with the issues lawmakers seek to address.¹⁵

E. FTC Should Revise its Proposed Changes to the Internal Operations Exception Addressing Engagement Techniques

The App Association believes the FTC’s proposed changes to the internal operations exception seeking to address engagement techniques is overly broad and would unintentionally cause a reduction in control and transparency. As proposed, FTC’s changes are not clear about what functions would be prohibited and would lead to an over-inclusive reading that would inhibit the use of features widely relied upon by parents and children, such as captioning and location notifications. Such an approach would fail to differentiate between features that are (1) commercial in nature or enable

¹⁴ Testimony of Morgan Reed, ACT | The App Association, Senate Commerce Committee Hearing, “Protecting Consumer Privacy,” September 29, 2021. <https://www.commerce.senate.gov/services/files/19181833-E747-4D4E-8548-C8FF9CDCA54D>

¹⁵ See *Reno v. ACLU*, 521 U.S. 844 (1997)

access to third parties and/or harmful content, and (2) intended to helpfully personalize a child's experience. Without such a distinction being made, the FTC's approach to engagement techniques would widely prohibit the ability to create content for children and to compete in the market, a result that is arbitrary to the intent of COPPA and, in restricting access to legal content online, gives rise to First Amendment concerns.

The App Association also opposes FTC's proposal to require operators to identify why they are collecting persistent identifiers and how they are compliant. Such a requirement would cause the release of sensitive security practice information with little to no benefit to parents and children and would undermine the exception for protect "the security and integrity of the user, website, or online service." We request that FTC clarify that COPPA regulations will not require the disclosure of sensitive information that would compromise security (i.e., could be used by a bad actor to undermine an operator's safety, security, or competitiveness).

F. FTC Should Provide Needed Flexibilities Through Exceptions to its Proposed Data Retention Requirements

The App Association requests that the COPPA rules' data retention/deletion requirements provide needed flexibility through exceptions to account for maintaining the security and integrity of the offering, preventing fraud and abuse, adhering to other legal requirements, and when a parent requests that data be retained. Providing for these circumstances in exceptions would ensure that the COPPA rules are reasonably flexible and that developers can be responsive to technical and user needs.

G. FTC Should Advance its Proposal for Codifying the School Authorization Exception

The App Association supports the FTC's proposal to codify its guidance allowing companies to get consent from schools, instead of parents, to collect personal information from students when that information is used only for educational purposes.

H. FTC Should, with Other Federal Agencies, States, and Industry, Support Digital Literacy and Education in K-12 Schools

FTC efforts to improve child privacy must include educational efforts for K-12 schools across the country to ensure that children have a baseline of digital literacy and are able to make informed decisions online. FTC's updated COPPA rules, once updated, should be operationalized in part through an education campaign for K-12 children in partnership with other federal agencies, states, and industry. The App Association is committed to assisting with such an educational campaign, building on its own related efforts.

IV. Conclusion

We thank FTC for the opportunity to comment and hope the information we provided helps to further improve the COPPA rules.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Scarpelli", written in a cursive style.

Brian Scarpelli
Senior Global Policy Counsel

ACT | The App Association
1401 K St NW (Ste 501)
Washington, DC 20005